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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT PEDRO ESPINOZA et al., Defendants and Appellants.	E046509 (Super.Ct.No. BLF004402) **OPINION**

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed with directions.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant Robert Pedro Espinoza.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant Walter Mauricio Vanegas.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

While imprisoned at Ironwood State Prison, defendants Robert Pedro Espinoza and Walter Mauricio Vanegas, along with a number of other inmates, were involved in an attack on prison guards. They were convicted of one count each of attempted battery by a prisoner on a nonprisoner. On appeal, they contend as follows:

1. Vanegas contends that the evidence was insufficient to support his conviction for attempted battery on a correctional officer.[1]

2. Vanegas contends that the trial court erred by failing to instruct on the defenses of necessity and duress.

3. Espinoza contends the trial court abused its discretion by refusing to strike two of his prior serious and/or violent felony convictions.

4. Espinoza contends the trial court erred by delegating the award of presentence custody credits to the probation department and that it thereafter erroneously determined he was entitled to no credits.

I

PROCEDURAL BACKGROUND

A jury found Vanegas guilty of attempted battery on a noninmate, Edward Gaytan (Pen. Code., §§ 664/4501.5).[2] The jury found Espinoza guilty of the same charge against Michael Leguillow. In a bifurcated proceeding, the trial court found that Vanegas had suffered one prior serious or violent felony conviction under sections 667, subdivisions

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[1] Espinoza joined in the arguments raised by Vanegas. However, the issues raised by Vanegas are not applicable to Espinoza.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

(c) and (e)(1) and 1170.12, subdivision (c)(1). The trial court found that Espinoza had suffered three prior serious or violent felony convictions under sections 667, subds. (c) and (e)(1) and 1170.12, subd (c)(1) and had served one prior prison term pursuant to section 667.5, subdivision (b).

Vanegas was sentenced to the low term of two years in state prison. Espinoza was sentenced to 25 years to life under the three-strikes sentencing scheme.

II

FACTUAL BACKGROUND

In the evening of April 24, 2006, at Ironwood State Prison, Department of Corrections and Rehabilitation Correctional Officer Eric Witzel was outside the dining hall checking the identification of inmates entering for dinner. Suddenly, he saw a "wall" of Hispanic men running toward the dining hall. Inmate Paul DeJesus[3] was part of the group and was running toward Officer Witzel with his "fists flinging." Officer Witzel ordered DeJesus to get down, but DeJesus continued toward him.[4] Officer Witzel tried to get out his baton, but DeJesus moved too fast and started hitting him with "flailing" blows that struck Officer Witzel all over his body.

Officer Witzel was able to pull out his baton and started fending off DeJesus. Other inmates were able to grab Officer Witzel by his collar and pull him to the ground.

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[3] DeJesus is not a subject of this appeal.

[4] Inmates had been advised the rules of the prison when they arrived and were told that any time they were told to get down, they must comply.

Officer Witzel curled up in a fetal position as inmates punched and kicked him with their fists and feet.[5]

Correctional Officer Gabriel Miranda was the assigned gunner in the observation tower overlooking the area of the dining hall. He observed a group of inmates approach Officer Witzel and saw one inmate start attacking him. At the same time, he observed approximately 20 Hispanic inmates rush the remaining staff on the exercise yard outside the dining hall and attack them.

Officer Miranda went on the public address system and ordered the inmates to get down at least two times. Officer Miranda also activated the alarm; inmates were trained that they were to go to the ground if the alarm sounded.

Officer Miranda loaded a 40-millimeter launcher with a nonlethal rubber bullet. He fired the bullet at DeJesus, but DeJesus continued to attack Officer Witzel.

Correctional Officer Lieutenant Michael Leguillow was monitoring the outside of the dining hall. He observed DeJesus attack Officer Witzel. Lieutenant Leguillow pulled out his baton and ordered all of the inmates in front of the dining hall to get down in a prone position. Although some of the inmates complied, a group of Hispanic inmates refused.

A group of 30 to 40 Hispanic inmates then charged toward the dining hall where Lieutenant Leguillow was standing. A group of approximately four or five inmates came directly at Lieutenant Leguillow. Espinoza was part of this smaller group. Espinoza

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[5] Officer Witzel was taken to the hospital after the incident and was released the same day. He had some injuries to his shoulder and been stabbed by something.

came up to Lieutenant Leguillow and swung his fist at the officer's face. Lieutenant Leguillow was able to move back and avoid being hit. If he had not moved back, Espinoza would have hit him.

Lieutenant Leguillow then swung his baton at Espinoza and struck him in the left elbow. Officer Miranda, who at this point had reloaded his launcher with a rubber bullet, saw that Lieutenant Leguillow was being attacked and shot at Espinoza's lower front body. It stunned Espinoza, who then ran away. Lieutenant Leguillow went to help Officer Witzel.

Correctional Officer Edward Gaytan heard the alarm and went to the dining hall to help the other officers. He observed Officer Witzel being attacked by an inmate. He then saw a group of inmates join in the attack on Officer Witzel. Officer Gaytan grabbed his baton.

As Officer Gaytan tried to get to Officer Witzel to help him, a group of four or five Hispanic inmates stopped him. Vanegas was in this group. Vanegas appeared to Officer Gaytan to be the "leader of the pack."

Vanegas got within an arm's length or two from Officer Gaytan and balled up his fists. He looked like he was "ready to strike" Officer Gaytan. Vanegas appeared to be in a martial arts stance or a combative stance with his hands raised up. Officer Gaytan yelled at Vanegas to get down. Vanegas did not comply and kept coming at Officer Gaytan, still looking "ready to strike." Officer Gaytan struck Vanegas in the thigh with his baton.

Vanegas kept coming toward Officer Gaytan. Vanegas got close enough that, if he had swung at Officer Gaytan, he would have hit him. Vanegas still had his hands up in the air and looked as though he was going to attack the officer. At some point, Vanegas attempted to hit Officer Gaytan.

After Vanegas was hit by the baton, he turned and looked at another inmate standing nearby. The inmate pushed Vanegas toward Officer Gaytan. Vanegas again approached Officer Gaytan, and Officer Gaytan again told him to get down. Officer Gaytan hit Vanegas with his baton in the rib cage. Vanegas again turned to the other inmate and was pushed back toward Officer Gaytan by the inmate. Officer Gaytan hit Vanegas with the baton for a third time.

Officer Miranda had loaded canisters of tear gas into the launcher and released the gas by shooting it into the ground. The inmates continued to assault the guards. Officer Miranda then armed himself with a .22-caliber rifle and loaded it with lethal bullets. Officer Miranda made the announcement over the loud speaker that he was going to fire lethal rounds and ordered all of the inmates to the ground. At this time, the inmates complied. Vanegas got down on the ground and put his hands behind his back. Officer Gaytan put handcuffs on Vanegas and got his identification card.

After the incident, Espinoza had injuries consistent with being shot by a rubber bullet but no injuries from being hit with the baton. Vanegas had an abrasion on the left side of his back and bruising near his waist on the back. The injury near Vanegas's waist was consistent with a baton strike. Several inmates had head injuries, and one had a broken arm.

Correctional Officer Juan Gutierrez was a gang investigation officer employed by Ironwood State Prison. He explained that the Sureño or Southern Hispanic gang is a Southern California gang under the authority of the Mexican Mafia. Any Hispanic member of a Southern California gang automatically becomes a Sureño gang member when he arrives in prison. The members of individual gangs put aside their differences and join together.

A person is not allowed to drop out of the Sureño gang. An inmate must tell staff he wants to leave the gang, and he will be put in a separate unit. Neither Espinoza nor Vanegas ever requested to withdraw from the Sureño gang.

According to the rules of the Sureño gang, if a member gets in an altercation with a correctional officer, all other members must ambush or assault the other staff to keep them from helping the assaulted person. A Sureño gang member who wants to assault a staff member at the prison may do it on his own or after consulting with the "shot caller," who would be the leader in that unit. The other members would back up the gang member regardless.

DeJesus was a member of the Sureño gang by virtue of the fact he was an admitted member of the South Side Lynwood street gang, a Southern California gang. He had a tattoo that stated "Sur" over his right eyebrow.

Officer Gutierrez also believed that Vanegas was a Sureño gang member. Vanegas had tattoos of "S" and "X3" on his chest. These stood for Stoners Trece or Stoners 13, a street gang from East Los Angeles. This gang was part of the Sureño gang. Officer Gutierrez explained that the number 13 was important because it was the number

used by the Sureños, and also "M" was the 13th letter of the alphabet, which stood for the Mexican Mafia.

Espinoza admitted to being a Los Coyotes gang member, a Sureño gang in Orange County. Espinoza had tattoos of "Coyotes," "13" and "OC" on his head. Espinoza had been found guilty of engaging in criminal activity in support of a street gang in 2003.

III

SUFFICIENCY OF EVIDENCE OF ATTEMPTED BATTERY

ON A NONPRISONER BY A PRISONER

Vanegas contends that the evidence was insufficient to support his conviction for violating section 4501.5, the attempted battery on Officer Gaytan, as there was no evidence he intended to hit Officer Gaytan.

A. *Standard of Review*

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Rather, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict — i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the

judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

"The uncorroborated testimony of a single witness is sufficient to sustain a [jury verdict], unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

B. *Analysis*

Vanegas was convicted of attempted battery by a prisoner on a nonprisoner. Section 4501.5 criminalizes a battery committed by a prisoner on a nonprisoner: "Every person confined in a state prison of this state who commits a battery upon the person of any individual who is not himself a person confined therein shall be guilty of a felony . . . ." Accordingly, the elements of a violation of this section are: (1) The defendant was confined in a state prison; (2) while confined, the defendant willfully touched the victim in a harmful or offensive manner; and (3) the victim was not confined in a state prison.

Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another." The slightest touching can constitute a battery. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.)

"An *attempt* to commit a crime requires a specific intent to commit the crime. [Citation.] This is true 'even though the crime attempted does not [require a specific intent].' [Citation.]" (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 710.) In order to constitute an attempt, a person must make a direct but ineffectual act toward its commission that is more than mere preparation. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) "Whether acts done in contemplation of the commission of a crime are merely

preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case." (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 14.)

As set forth, *ante*, the jury was required to find that Vanegas made a direct but ineffectual act toward an offensive touching of Officer Gaytan. Vanegas claims that his acts were preparatory and that there was no evidence that he actually attempted to apply force to Officer Gaytan. We conclude the evidence supports the jury's finding that Vanegas attempted to batter Officer Gaytan.

Here, Officer Gaytan was running to help Officer Witzel, who was being attacked by other inmates, when he was confronted by four or five inmates. Vanegas appeared to be the leader of these inmates. Vanegas got 'pretty close" to Officer Gaytan when he raised up his arms in a combative stance and balled up his fists. Vanegas kept coming at Officer Gaytan looking "ready to strike." Officer Gaytan hit Vanegas with his baton, but Vanegas kept coming at him. Vanegas had his hand in the air and looked as though he was going to attack Officer Gaytan. Officer Gaytan testified that Vanegas then attempted to hit him.

In his reply brief, Vanegas insists that Officer Gaytan did not testify that Vanegas attempted to hit him by striking at him but merely equated attempting to hit him with taking a combative stance. However, Officer Gaytan testified twice that he saw Vanegas try to hit him. That evidence went uncontested and went beyond Vanegas just taking a combative stance.

In reviewing the evidence in the light most favorable to the prosecution, Officer Gaytan's testimony that Vanegas did attempt to hit him while within striking distance was sufficient to support his conviction for attempted battery by a prisoner on a nonprisoner.

IV

DEFENSE INSTRUCTIONS ON DURESS AND NECESSITY

Vanegas claims that the trial court erred by failing to sua sponte instruct the jury on the defenses of duress (California Judicial Council of California Jury Instructions (CALCRIM) No. 3402) and necessity (CALCRIM No. 3403) for the charge of attempted battery by a prisoner on a nonprisoner.

Here, at no time during the discussion of the instructions did Vanegas request that the trial court instruct the jury on necessity or duress. Hence, the only obligation to instruct the jury on the defense theories of duress and necessity would be sua sponte. A trial court is required to instruct sua sponte on a particular defense "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195.) "[A] trial court has no obligation to instruct sua sponte on a defense supported by 'minimal and insubstantial' evidence [citation] . . . ." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1152.)

A. *Duress*

Pursuant to section 26, "[a]ll persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] . . . Persons (unless the crime be

punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (See also *People v. Wilson* (2005) 36 Cal.4th 309, 331.) Accordingly, in order to instruct on duress, there must be evidence that "the act was done under such threats or menaces that [defendant] had (1) an actual belief his life was threatened and (2) reasonable cause for such belief. [Citation.]" (*People v. Heath* (1989) 207 Cal.App.3d 892, 900 (*Heath*).)

"Duress is an effective defense only when the actor responds to an immediate and imminent danger. '[A] fear of *future* harm to one's life does not relieve one of responsibility for the crimes he commits.' [Citations.] The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent." (*Heath, supra*, 207 Cal.App.3d at p. 900.) "The defense of duress . . . requires that the threat or menace be accompanied by a direct or implied demand that the defendant commit the criminal act charged." (*People v. Steele* (1988) 206 Cal.App.3d 703, 706.)

Here, Vanegas points to the evidence that after he was hit once by Officer Gaytan's baton, he turned away, and another inmate pushed him back toward Officer Gaytan. Further, he relies on the testimony regarding the Sureño gang and that all Sureño gang members had an agreement to get involved in assaults by their members on staff.

This evidence does not support giving the duress instruction. There was no evidence that Vanegas was threatened by the inmate to commit the attempted battery on Officer Gaytan. There were no statements made by the other inmate and no indication

whether he appeared menacing or was merely encouraging Vanegas to continue. To the extent that Vanegas contends that he approached Officer Gaytan out of fear for his life, the evidence simply does not support such statement.

The only possible evidence here was that Vanegas may have had some fear that if he did not participate in the action against the guards, he might later be hurt by other Sureño gang members. Any such fear would be of future harm, which renders the duress defense inapplicable. (*Heath, supra*, 207 Cal.App.3d at p. 900.) Therefore, the trial court had no sua sponte duty to instruct the jury on the defense of duress, as it was not supported by the evidence.

Further, the defense of duress was inconsistent with Vanegas's defense. Vanegas maintained that although he took a combative stance, he never attempted to hit Officer Gaytan. In his closing argument, Vanegas stated that he never attempted to hit Officer Gaytan, and there was no evidence of battery. Vanegas also argued that the attack was not planned by the Sureño gang and that he was not required to participate. Instructing with duress would have been inconsistent with Vanegas's defense that he did not commit the attempted battery.

There simply was no evidence presented to support a duress instruction.

B. *Necessity*

Vanegas further contends that the trial court erred by failing to instruct the jury on necessity.

The defense of necessity, unlike duress, is based on a public policy decision not to punish a person who commits a crime out of necessity. (*Heath, supra,* 207 Cal.App.3d at

p. 901.) The defense of necessity "is very limited and depends on the lack of a legal alternative to committing the crime. It excuses criminal conduct [only] if it is justified by a need to avoid an imminent peril and there is no time to resort to the legal authorities or such resort would be futile." (*People v. Beach* (1987) 194 Cal.App.3d 955, 971; distinguished on another point in *People v. Neidinger* (2006) 40 Cal.4th 67, 76-79.)

"To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that []he violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which []he did not substantially contribute to the emergency. [Citations.]" (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135.) The necessity defense, as opposed to the duress defense, "contemplates a threat in the immediate future. [Citation.] The defendant has the time, however limited, to consider alternative courses of conduct." (*Heath, supra*, 207 Cal.App.3d at p. 901.) These elements must be proved by a preponderance of the evidence. (*Ibid*.)

Here, the evidence did not establish that Vanegas faced a "significant or imminent evil" and had no legal alternative but to attack Officer Gaytan. Although there was testimony by Officer Gutierrez that a Sureño gang member had to become involved with other Hispanic inmates in attacks on staff, there was no testimony as to the consequences of not participating. And even if one could surmise that the other gang members might beat up the nonparticipating member, that is not to say assaulting a staff member and

potentially facing additional prison time or discipline was a better alternative. Vanegas could have simply gone down on the ground as was required when the alarm went off or run away as opposed to attempting to hit Officer Gaytan.

The public policy reasons behind necessity are simply not applicable to Vanegas, who involved himself in a gang action against staff members in prison. (See *People v. Kearns, supra*, 55 Cal.App.4th at pp. 1135-1136.) Vanegas certainly was not acting in good faith and created more of a danger than would have resulted if he had not attacked Officer Gaytan. No necessity instruction was required by the evidence.

Based on the foregoing, the trial court did not have a sua sponte duty to instruct the jury on the defenses of necessity or duress. Even if we were to assume that the trial court erred in by failing to instruct the jury with the defenses of necessity and duress, we find the error to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1332-1335.)

There was no evidence of duress or necessity and strong evidence that Vanegas was responsible for the attack on Officer Gaytan. The evidence presented was that Vanegas was the "leader of the pack" of inmates who ran toward Officer Gaytan. Vanegas immediately got into Officer Gaytan's face and put his fists up in the air. While the evidence showed that Vanegas looked at another inmate after he was hit by Officer Gaytan's baton and that the inmate pushed him back toward Officer Gaytan, there was no evidence that the inmate threatened Vanegas's life or even great bodily harm if he did not participate. The evidence overwhelmingly established that Vanegas voluntarily involved

himself in the attack on Officer Gaytan. Any error in failing to instruct the jury on duress and necessity was clearly harmless beyond a reasonable doubt.

V

ROMERO MOTION

Espinoza contends that the trial court abused its discretion by declining to strike two of his three prior felony convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

A. *Additional Factual Background*

Espinoza was charged with having suffered three prior serious or violent felony convictions. These included two convictions for robbery (§ 211) suffered on March 7, 1996, and one conviction of carrying a loaded firearm (§ 12031, subd. (a)(2)) for the benefit of a gang (§ 186.22, subd. (a)) suffered on December 11, 2003.

Espinoza brought a written *Romero* motion to strike the two prior robbery convictions alleged as strike convictions. The People filed opposition and included the police reports from Espinoza's prior cases and records from the Orange County Probation Department.

At the court trial on the prior convictions (after both defendants waived their right to a jury trial), the People presented two section 969b packets of Espinoza's prior convictions. The trial court found the prior convictions true.[6]

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[6] At the time of the *Romero* motion, Espinoza requested a presentence probation report. However, it was not prepared. At the time of sentencing, he waived the presentence probation report.

The trial court then heard the *Romero* motion. Espinoza's father testified that his son was intoxicated on the night that he was accused of committing the robberies. He also believed that if Espinoza was released from prison, he would go back to school, live with him, and receive counseling. Espinoza's mother also testified that he could live with her if released from prison.

Espinoza's counsel argued that Espinoza was intoxicated at the time he committed the two prior robberies and had been only 19 years old at the time. The convictions were too old to be considered strikes. Espinoza's counsel also stated that attempting to hit a correctional officer did not warrant putting Espinoza, who was 32 years old at the time, in prison for life. Further, he had tremendous family support. Espinoza's counsel asked that Espinoza only be sentenced to a one-strike sentence. The People responded that the trial court should not strike any of the prior convictions. According to the police report, Espinoza had been the leader of the group during the robberies (during which two bicycles were taken from two separate victims) and had threatened one of the victims. Further, Espinoza continued to engage in criminal activity. Finally, the instant offense was a violent attack on a correctional officer.

The trial court denied the *Romero* motion, finding, "The Legislature and the People of the State of California enacted the Three Strikes Laws, and that was not done without due consideration, though personally I believe that the intent was to make violent crimes less likely to occur. [¶] Mr. Espinoza has strikes for violent crimes. Robbery is a violent crime: no ifs, ands, or buts. [¶] And the subsequent behavior in which he has engaged in, rather than engaging in something productive like furthering his education,

had exacerbated that problem." Espinoza was then sentenced to 25 years to life in state prison.

B. *Analysis*

A trial court's decision to not dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978, quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 and *People v. Preyer* (1985) 164 Cal.App.3d 568, 573; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309.)

The California Supreme Court explained, "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court

was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378, citing *People v. Langevin* (1984) 155 Cal.App.3d 520, 524 and *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.)

But "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

Here, Espinoza has not met his burden of showing that the trial court's decision not to strike two of his prior convictions was irrational or arbitrary. The trial court's

determination that a three-strikes sentence was warranted based on the seriousness of the instant offense, the violent nature of Espinoza's prior offenses, and his continued criminal history was well within the trial court's discretion.

Initially, we disagree with Espinoza that the prior offenses of robbery were not "serious." According to the police report for the incident that led to his convictions of robbery, Espinoza was with a group of three other men who took bicycles from two separate victims at a park. When one of the victims hesitated to give up his bike, Espinoza said to him, "Man do you have a problem, do I have to jack you?" Espinoza then reached into his pocket as if to retrieve a weapon. One of the other men with defendant showed a knife to the same victim when the victim threatened to call police. Although it is true only bicycles were taken, Espinoza threatened one of the victims and was with another person who pulled out a knife on the victim.

We also disagree with Espinoza that the instant offense was not serious enough to justify imposition of a 25-years-to-life sentence. Here, Espinoza led an assault on staff at the Ironwood State Prison. Although he was unable to connect his punch on Lieutenant Leguillow, he created a very dangerous situation. Further, he presumably did so with the help of other gang members. Although Espinoza complains that his codefendants received lesser sentences for the same crimes, his sentence was based not only on his actions in this case, but also on his recidivism.

Further, although the robbery offenses were committed 13 years prior to the instant crime, Espinoza was almost continuously in custody or on parole since he committed those robberies. During the intervening years, Espinoza "did not refrain from

criminal activity" and "he did not add maturity to age." (*People v. Williams, supra,* 17 Cal.4th at p. 163.)

On March 7, 1996, when Espinoza was 19 years old, he was placed on three years' probation for pleading guilty to the above-mentioned two robberies. On February 17, 1997, Espinoza was found to have violated his probation based on testing positive for drugs, and a gun was found in the house where he was living. He was sent to prison for two years.

Defendant was eventually paroled in August 2001 and discharged from parole in October 2001. On December 11, 2003, he pleaded guilty to carrying a loaded firearm while not being the registered owner and having committed the crime for the benefit of a street gang. He was sentenced to six years in state prison. Defendant committed the instant offense while serving that sentence.

Despite a short period between 2001 and 2003, Espinoza has spent most of his adult life in prison. Given Espinoza's continuous criminal history and the fact that he was part of a group assault on correctional officers with his fellow gang members, we cannot conclude that the prior convictions of robbery were too remote or that the trial court abused its discretion by refusing to strike them. Defendant was within the spirit of the three strikes law, and the trial court did not abuse its discretion by refusing to strike his two prior robbery convictions.

VI

PRESENTENCE CUSTODY CREDITS

In Espinoza's opening brief, he contended that the trial court erred by deferring the calculation of custody credits to the probation department, who determined that he was entitled to no actual presentence custody or good time/work time conduct credits. The People responded that Espinoza was not entitled to any presentence custody credits because he was serving a prison sentence on another conviction at the time that he was on trial for the instant offense. In response, Espinoza contends that the record does not support that he was in state prison custody the entire time prior to sentencing in the instant case.

At the time of sentencing, no probation report had been prepared for Espinoza, and it was waived by him. In imposing sentence, the trial court stated, "[H]e'll be given credit for time from the original date that the sentencing was set. That's to be calculated by the Probation Department." Espinoza did not object. Pursuant to the abstract of judgment, the presentence actual and conduct custody credits were set at zero by the probation department.

A defendant generally receives credit for actual time served prior to sentencing and additionally receives "conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence." (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125, citing §§ 2900.5, 4019; see also *In re Reeves* (2005) 35 Cal.4th 765, 768, fn. 4 [explaining term "conduct credit"].)

"A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) In *People v. Philpot* (2004) 122 Cal.App.4th 893, 908 [Fourth Dist., Div. Two], this court held that "presentence conduct credits are available to a defendant sentenced to an indeterminate life term under the three strikes law."

The People are correct that if defendant were in state prison during the time prior to sentencing in the instant case on his prior convictions, he would not be entitled to presentence custody credits. (See *In re Rojas* (1979) 23 Cal.3d 152, 154.) The People assume that Espinoza was still in custody on his 2003 conviction up until the time of sentencing.

The problem on this record is that it is unclear whether Espinoza was in state prison custody up until the time of sentencing. It does appear that he may have been. Defendant was sentenced to six years in prison on December 11, 2003. Espinoza was in custody at Ironwood State Prison on May 4, 2007, and was transferred to the Riverside County Sheriff's Department for the trial proceedings in this case. Espinoza's counsel indicated that his prior sentence was increased by one year due to this incident. He was sentenced on August 22, 2008.

However, Espinoza has provided a plausible calculation that it is possible, with credit for time served, that he could have been out of custody and in custody in the local jail only awaiting sentencing in this case. Espinoza was in the custody of the Riverside County Sheriff's Department on the day of sentencing. The record does not shed any

light on how the probation department calculated the presentence custody credits because no presentence probation report was prepared.

Since we cannot discern from the record before us whether Espinoza was entitled to actual presentence custody and/or conduct credits, we have no choice but to direct the trial court to make a determination whether Espinoza was entitled to such credits, and if so, to calculate the appropriate credits.

VII

DISPOSITION

The trial court is directed to make a determination of whether Espinoza is entitled to any actual presentence custody and/or conduct credits, and if so, to calculate those credits. If Espinoza is granted presentence custody credits, the trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

We concur:

GAUT
J.

KING
J.